A

KIJAL RESORT SDN BHD v. PENTADBIR TANAH KEMAMAN & ANOR

FEDERAL COURT, PUTRAJAYA
RICHARD MALAJUM CJ (SABAH & SARAWAK)
ZALEHA ZAHARI FCJ
B
MOHAMED APANDI ALI FCJ
ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
[CIVIL APPEAL NO: 01(f)-39-09-2013 (T)]
1 OCTOBER 2014

C

ADMINISTRATIVE LAW: *Exercise of judicial functions – Judicial review – Application for – Challenging decision of State Authority – Preliminary objections raised – Whether application for judicial review made beyond 40 days time frame stipulated under O. 53 r. 3(6) Rules of the High Court 1980 – Whether there was*
D *an inordinate delay by appellant – Whether High Court had jurisdiction to hear appellant's application for judicial review – Whether respondents estopped from raising preliminary objections – Whether application allowed*

LAND LAW: *Acquisition of land – Acquisition for public purpose – Setting aside acquisition – Application for judicial review – Challenging decision of State*
E *Authority – Whether Form H of the Land Administrator's award must be served and communicated to a landowner within two years as prescribed by s. 8(4) of Land Acquisition Act 1960 – Whether Form H conveys decision of State Authority to acquire land – Whether decision of State Authority to acquire land was first communicated through Form E – Whether application for judicial review made*
F *beyond 40 days time frame stipulated under O. 53 r. 3(6) Rules of the High Court 1980 – Whether there was inordinate delay by appellant – Whether application allowed – Land Acquisition Act 1960, ss.* 11, 12, 14, 16, 52, 53 & 54

The appellant was the registered proprietor of part of a land ('the land') which the State Authority of Terengganu had decided to acquire for public
G purpose. An official notification as in Form D of the Land Acquisition Act 1960 ('the LAA') was gazetted in the government gazette on 21 July 2005 pursuant to s. 8(1) of the LAA. Subsequently, a notification in Form E of the LAA was issued on 28 February 2006 and served on the appellant on 7 March 2006. On 27 November 2007, the first respondent served upon the
H appellant a notice of award in Form H of the LAA. The appellant, however, rejected the award and indicated its intention to set aside the entire award and the acquisition. The appellant then filed an *ex parte* application in the High Court on 6 January 2008 for leave to proceed with judicial review pursuant to O. 53 r. 3 of the Rules of the High Court 1980 ('RHC') against the first
I respondent and the second respondent. Pursuant to the leave granted to proceed with the judicial review on 20 May 2008, the appellant filed its

substantive application for judicial review on 1 June 2008 and served the same on the first and second respondents, who then filed their respective affidavits in reply and opposition to the application. The second respondent raised these preliminary objections (i) that the judicial review application was filed outside the stipulated 40 days period provided for under O. 53 r. 3(6) of the RHC and consequently the application should be dismissed *in limine;* and (ii) that the proper party, the State Authority, was not named as the respondent. The High Court dismissed the appellant's application without mentioning anything about the two preliminary objections raised. On appeal by the appellant to the Court of Appeal, the second respondent once again raised the two preliminary objections. The Court of Appeal upheld the said preliminary objections and dismissed the appellant's application. On 30 July 2013, the appellant was granted leave to appeal to the Federal Court against the decision of the Court of Appeal on the following questions (a) whether Form H of the Land Administrator's award must be served and communicated to a landowner within two years as prescribed by s. 8(4) of the Land Acquisition Act 1960 (Question 1); (b) whether failure to serve Form H pursuant to s. 8(4) of the LAA would cause acquisition to lapse and cease to have any effect (Question 2); (c) in a land acquisition under the LAA, whether Form H constitutes a final decision by the Land Administrator to proceed and complete with the compulsory acquisition and tantamount to a decision to reject a landowner's request/appeal against such an acquisition (Question 3); (d) if the answer to Question 3 was in the affirmative, whether the 40 days time frame stipulated under O. 53 r. 3(6) of the RHC should run from the date of service of Form H on the appellant (Question 4); (e) whether a respondent could raise preliminary objections that were the subject matter and properly belonged to the proceedings at the leave stage or was a respondent barred and estopped from raising such preliminary objection especially when the respondent had conceded to such leave being granted by the High Court (Question 5); and (f) in an appeal to the Court of Appeal against a judicial review by a High Court, whether a respondent was deemed to have waived its rights to make any preliminary objection and was estopped from ever raising it again during the leave stage (Question 6).

Held (dismissing appeal with costs)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) Reading s. 8(4) of the LAA together with other relevant sections, particularly ss. 12, 14 and 16 of the same Act, it is plain and unambiguous that what needs to be done by the Land Administrator after the publication of Form D in the gazette is to conduct and conclude an enquiry under s. 12, and upon such conclusion of the enquiry the Land Administrator shall within the period of two years from the date of the gazette prepare a written award in Form G. If no award is made and Form G is not prepared by the Land Administrator within the two

year period, the declaration in Form D shall lapse and cease to be of any effect. There is no provision in the LAA which indicates that Form H must be served on or communicated to the land owner within two years, from the date of publication of Form D in the gazette. (para 70)

(2) In the present case, Form D was published in the gazette on 21 July 2005 and the award in Form G pursuant to s. 14(1) of the LAA was made on 3 August 2006. For the purpose of s. 8(4) of the LAA, the said award in Form G was well within the two years period from the date of the gazette of Form D. That being the case, the issue of failure to serve Form H in the context of s. 8(4) of the LAA as raised by the appellant in Question 2 did not arise. Section 8(4) of the LAA only relates to the making of an award and preparation of Form G by the Land Administrator. It did not relate to service of Form H to the land owner or other interested parties. Therefore, the answer to Question 1 was in the negative. (paras 74 & 75)

(3) Form H could not be the starting point to calculate when the 40 day time frame under O. 53 r. 3(6) of the RHC starts to run as contended by the appellant. Form H is issued based on the award by the Land Administrator under s. 14(1) of the Act. It includes an extract from the written award of the Land Administrator in Form G. It is a notice of award and offer of compensation in respect of the land acquired. It does not convey the decision of the State Authority to acquire the land (which formed the subject matter of the judicial review). The said decision was earlier conveyed to the appellant *vide* Form E with the schedule appended to it, which the appellant had earlier received on 7 March 2006. It was through Form E with the schedule that the decision of the State Authority to acquire the land was 'first communicated' to the appellant as the registered owner of the land in question. (para 118)

(4) An application for leave for judicial review made under O. 53 r. 3(6) of the RHC challenging the decision of the State Authority declaring that the land is to be acquired under the LAA, must be filed within 40 days from the date when the decision was first communicated to the appellant *ie*, on the date when the notice of enquiry in Form E which appended a copy of the schedule to Form D was served pursuant to s. 10 of the LAA on the registered proprietor or occupier of the land pursuant to ss. 11, 52, 53 and 54 of the LAA. Herein, Form E was served on the appellant on 7 March 2006. Application for leave for judicial review was filed on 6 January 2008 *ie*, almost 22 months after the decision to acquire the land in question was first communicated to the appellant. This was clearly beyond the 40 days time frame as stipulated in O. 53 r. 3(6) of the RHC. There had been an inordinate delay on the part of the appellant in filing for judicial review. There was no indication to

show that the appellant had applied for an extension of time. Thus, the High Court had no jurisdiction to hear the appellant's application for judicial review on the ground that the time frame under O. 53 r. 3(6) had not been complied with. On this ground alone, the respondent's first preliminary objection must be upheld and the judicial review application by the appellant ought to be dismissed *in limine*. In view of this, there was no necessity for this court to consider the second objection that the proper party was not named as the first respondent. (paras 116-117 & 123-124)

(5) At the leave stage, the application was made by the appellant *ex parte*. Both the first and second respondents were not present in court as they were not served yet with all the relevant documents. Obviously, the respondents could not be expected to raise any preliminary objection at the leave stage. Therefore, the question as to whether the respondents were barred and estopped from raising such preliminary objections after leave had been granted did not arise. The first appearance by both the respondents in the application was when the application proper was heard *inter partes*. That was the first and earliest opportunity for them to appear and to raise the preliminary objections. There was nothing irregular about that. (para 126)

(6) The respondents were at liberty to raise the preliminary objections when the case came up for appeal at the Court of Appeal particularly when the High Court Judge failed to consider their objections earlier. There was no legal impediment for that. The Court of Appeal was correct in hearing the preliminary objections and subsequently dismissing the appeal after allowing the objections. (para 132)

Per Zaleha Zahari FCJ (concurring):

(1) Section 8(1) of the LAA is the operative provision with regard to the notification of the State Authority's decision of its intention to acquire which land, or part of land and for what purpose. In respect of an acquisition of land, the publication of such an intention in the gazette in terms of the Form D affords the public, and the appellant in particular, the most practical and sensible way in which to give notice of the State Authority's intended acquisition. Giving the words in s. 8(1) its plain and ordinary meaning, the intention of the legislature presumes that the notice of the public had been sufficiently drawn to the acquisition by way of publication in the gazette. Section 8(1) established positively and as a fact that this acquisition was to the knowledge of the appellant. If the law fixed the public with knowledge, and deemed such knowledge to be a fact, this court must necessarily give effect to it. (para 45)

(2) The Court of Appeal was right in ruling that the filing of the application for leave to apply judicial review for an order of *certiorari* must be filed within 40 days of the publication of Form D in the gazette and not the service of Form H. In this case, the Form D declaration of the intended acquisition was gazetted on 21 July 2005. The leave application was filed 6 January 2008. The appellant had clearly not acted "promptly" nor within 40 days as prescribed in O. 53 r. 3(6). The application clearly was filed years beyond the time frame prescribed. (para 46)

(3) The law relating to extension of time for judicial review is clear. The appellant had not applied for an extension of time and had given no reason for the delay. There was thus no basis warranting the court to exercise its discretionary power to extend time. (para 47)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah tuan punya berdaftar sebahagian daripada tanah ('tanah') yang Pihak Berkuasa Negeri Terengganu telah memutuskan untuk mengambil alih bagi kegunaan awam. Satu pemberitahuan rasmi dalam Borang D Akta Pengambilan Tanah 1960 ('APT') diwartakan dalam warta kerajaan pada 21 Julai 2005 di bawah s. 8(1) APT. Selanjutnya, satu pemberitahuan dalam Borang E APT telah dikeluarkan pada 28 Februari 2006 dan diserahkan kepada perayu pada 7 Mac 2006. Pada 27 November 2007, responden pertama menyerahkan kepada perayu satu notis award Borang H APT. Perayu, walau bagaimanapun, menolak award tersebut dan menunjukkan niatnya untuk mengenepikan keseluruhan award dan pengambilan tersebut. Perayu kemudiannya memfailkan permohonan *ex parte* di Mahkamah Tinggi pada 6 Januari 2008 untuk kebenaran meneruskan dengan semakan kehakiman di bawah A. 53 k. 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap responden pertama dan responden kedua. Menurut kebenaran yang diberikan untuk meneruskan semakan kehakiman pada 20 Mei 2008, perayu memfailkan permohonan substantif untuk semakan kehakiman pada 1 Jun 2008 dan menyerahkannya kepada responden pertama dan kedua, di mana masing-masing seterusnya memfailkan afidavit jawapan dan bantahan terhadap permohonan. Responden kedua membangkitkan tiga bantahan awalan (i) bahawa permohonan semakan kehakiman telah difailkan di luar tempoh 40 hari yang ditetapkan di bawah A. 53 k. 3(6) KMT dan akibatnya permohonan tersebut patut ditolak *in limine;* dan (ii) bahawa pihak yang sepatutnya, Pihak Berkuasa Negeri, tidak dinamakan sebagai responden. Mahkamah Tinggi menolak permohonan perayu tanpa menyentuh dua bantahan awalan yang telah dibangkitkan. Atas rayuan oleh perayu ke Mahkamah Rayuan, responden kedua sekali lagi membangkitkan dua bantahan awalan tersebut. Mahkamah Rayuan mempertahankan kedua-dua bantahan awalan tersebut dan menolak permohonan perayu. Pada 30 Julai 2013, perayu telah diberi kebenaran untuk merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan berkenaan soalan-soalan

berikut (a) sama ada Borang H daripada award Pentadbir Tanah harus diserahkan dan dikomunikasikan kepada pemilik tanah dalam tempoh dua tahun seperti yang ditetapkan oleh s. 8(4) APT (Soalan 1); (b) sama ada kegagalan menyerahkan Borang H di bawah s. 8(4) APT akan menyebabkan pengambilan tersebut luput dan tidak mempunyai kesan (Soalan 2); (c) dalam pengambilan tanah di bawah APT, sama ada Borang H merupakan keputusan muktamad oleh Pentadbir Tanah untuk meneruskan dan menyelesaikan pengambilan wajib sama seperti keputusan menolak permintaan/rayuan pemilik tanah terhadap pengambilan itu (Soalan 3); (d) jika jawapan kepada Soalan 3 dijawab secara afirmatif, sama ada tempoh 40 hari yang ditetapkan di bawah A. 53 k. 3(6) KMT harus bermula dari tarikh penyerahan Borang H ke atas perayu (Soalan 4); (e) sama ada responden boleh membangkitkan bantahan awalan yang menjadi hal perkara dan sememangnya harus dibangkitkan dalam prosiding pada peringkat mendapatkan kebenaran atau responden dilarang atau diestop daripada membangkitkan bantahan awalan terutamanya apabila responden telah mengakui kepada kebenaran yang telah diberikan oleh Mahkamah Tinggi (Soalan 5); dan (f) dalam rayuan ke Mahkamah Rayuan terhadap semakan kehakiman oleh Mahkamah Tinggi, sama ada responden dianggap telah mengetepikan hak membangkitkan bantahan awalan dan diestop daripada membangkitkannya lagi sekali di peringkat mendapatkan kebenaran.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Membaca s. 8(4) APT bersama dengan seksyen-seksyen relevan yang lain, terutamanya ss. 12, 14 dan 16 Akta yang sama, adalah jelas dan nyata bahawa apa yang harus dibuat oleh Pentadbir Tanah selepas penerbitan Borang D dalam warta adalah untuk melaksanakan dan menyimpulkan persoalan di bawah s. 12, dan atas kesimpulan persoalan itu Pentadbir Tanah seharusnya dalam tempoh dua tahun dari tarikh warta menyediakan satu award bertulis dalam Borang G. Jika tiada award dibuat dan Borang G tidak disediakan oleh Pentadbir Tanah dalam tempoh dua tahun, pengisytiharan dalam Borang D akan luput dan tidak mempunyai kesan. Tiada peruntukan dalam APT yang menunjukkan bahawa Borang H harus disampaikan atau dikomunikasikan kepada pemilik tanah dalam tempoh dua tahun, daripada tarikh penerbitan Borang D dalam warta.

(2) Dalam kes ini, Borang D telah diterbitkan dalam warta pada 21 Julai 2005 dan award dalam Borang G di bawah s. 14(1) APT telah dibuat pada 3 Ogos 2006. Bagi tujuan s. 8(4) APT, award tersebut dalam Borang G adalah dalam tempoh dua tahun daripada tarikh warta dalam Borang D. Dengan itu, isu kegagalan menyerahkan Borang H dalam konteks s. 8(4) APT seperti yang dibangkitkan oleh perayu dalam Soalan 2 tidak timbul. Seksyen 8(4) APT hanya berhubungan dengan pembuatan award

dan menyediakan Borang G oleh Pentadbir Tanah. Ia tiada hubungan dengan penyerahan Borang H kepada pemilik tanah atau pihak-pihak lain yang berkepentingan. Oleh itu, Soalan 1 dijawab secara negatif.

(3) Borang H tidak boleh menjadi titik permulaan untuk mengira bila tempoh 40 hari di bawah A. 53 k. 3(6) KMT harus bermula seperti yang dihujahkan oleh perayu. Borang H telah dikeluarkan berdasarkan award oleh Pentadbir Tanah di bawah s. 14(1) Akta. Ia termasuk ekstrak daripada award bertulis Pentadbir Tanah dalam Borang G. Ia adalah suatu notis award dan tawaran pampasan berkenaan tanah yang diambil. Ia tidak menyampaikan keputusan Pihak Berkuasa Negeri untuk mengambil tanah (yang menjadi hal perkara bagi semakan kehakiman). Keputusan tersebut telah disampaikan kepada perayu melalui Borang E dengan jadual yang dilampirkan kepadanya, yang telah diterima oleh perayu lebih awal pada 7 Mac 2006. Ia adalah melalui Borang E dengan jadual bahawa keputusan Pihak Berkuasa Negeri untuk mengambil tanah telah dikomunikasikan seawal-awalnya pada perayu sebagai pemilik berdaftar tanah berkenaan.

(4) Permohonan kebenaran untuk semakan kehakiman yang difailkan di bawah A. 53 k. 3(6) KMT yang mencabar keputusan Pihak Berkuasa Negeri yang mengisytiharkan tanah diambil di bawah APT, harus difailkan dalam tempoh 40 hari daripada tarikh apabila keputusan telah dikomunikasikan kepada perayu iaitu tarikh apabila notis pertanyaan dalam Borang E melampirkan salinan jadual ke Borang D diserahkan di bawah s. 10 APT pada tuan punya berdaftar atau penduduk tanah di bawah ss. 11, 52, 53 dan 54 APT. Di sini, Borang E telah diserahkan kepada perayu pada 7 Mac 2006. Permohonan untuk kebenaran semakan kehakiman telah difailkan pada 6 Januari 2008 iaitu hampir 22 bulan selepas keputusan untuk mengambil tanah tersebut telah dikomunikasikan kepada perayu. Ini jelas di luar tempoh 40 hari yang ditetapkan di bawah A. 53 k. 3(6) KMT. Terdapat satu kelewatan yang keterlaluan dari pihak perayu dalam memfailkan semakan kehakiman. Tiada indikasi bahawa perayu telah memohon lanjutan masa. Oleh itu, Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar permohonan perayu untuk semakan kehakiman atas alasan bahawa tempoh yang diberikan di bawah A. 53 k. 3(6) tidak dipatuhi. Atas alasan ini sahaja, bantahan awalan pertama yang dibangkitkan responden harus dipertahankan dan permohonan semakan kehakiman perayu harus ditolak *in limine*. Oleh itu, mahkamah ini tidak perlu mempertimbangkan bantahan awalan kedua bahawa pihak yang sepatutnya telah tidak dinamakan sebagai responden pertama.

(5) Pada peringkat mendapatkan kebenaran, permohonan telah dibuat oleh perayu secara *ex parte*. Kedua-dua responden pertama dan kedua tidak hadir di mahkamah kerana mereka tidak diserahkan dengan dokumen-dokumen yang relevan. Secara jelasnya, responden tidak dijangka membangkitkan apa-apa bantahan awalan pada peringkat mendapatkan kebenaran. Oleh itu, persoalan bahawa responden-responden dilarang dan diestop daripada membangkitkan bantahan awalan selepas kebenaran diberikan tidak timbul. Penampilan pertama oleh kedua-dua responden dalam permohonan adalah apabila permohonan telah didengar secara *inter partes*. Itu adalah peluang pertama dan paling awal untuk responden-responden menampilkan diri dan membangkitkan bantahan awalan. Tiada ketidakaturan berlaku di sini.

(6) Responden-responden bebas untuk membangkitkan bantahan awalan apabila kes dikemukakan untuk rayuan di Mahkamah Rayuan terutamanya apabila Hakim Mahkamah Tinggi gagal mengambil kira bantahan-bantahan mereka sebelum ini. Tiada halangan undang-undang untuk itu. Mahkamah Rayuan betul apabila mendengar bantahan awalan dan kemudiannya menolak rayuan selepas membenarkan bantahan-bantahan itu.

Oleh Zaleha Zahari HMP (menyetujui):

(1) Seksyen 8(1) APT adalah peruntukan yang berkuatkuasa berkenaan dengan pemberitahuan keputusan Pihak Berkuasa Negeri yang bercadang untuk mengambil tanah, atau sebahagian tanah dan tujuannya. Berkenaan dengan pengambilan tanah, tujuan penerbitan sebegitu dalam warta dari segi Borang D menyediakan kepada pihak awam, dan perayu terutamanya, cara paling wajar dan praktikal untuk memberikan notis mengenai tujuan pengambilan oleh Pihak Berkuasa Negeri. Memberi makna yang lazim dan sederhana kepada perkataan dalam s. 8(1), niat badan perundangan adalah anggapan bahawa pihak awam telah diberikan notis yang secukupnya mengenai pengambilan tersebut melalui penerbitan warta. Seksyen 8(1) membentuk secara positif dan sebagai fakta bahawa perayu berpengetahuan mengenai pengambilan ini. Jika undang-undang menetapkan bahawa pihak awam mempunyai pengetahuan, dan pengetahuan itu disifatkan sebagai suatu fakta, mahkamah ini mesti memberi kesan kepadanya.

(2) Mahkamah Rayuan adalah betul apabila memutuskan bahawa pemfailan permohonan untuk mendapatkan kebenaran memohon semakan kehakiman bagi perintah *certiorari* harus difailkan dalam tempoh 40 hari dari penerbitan Borang D dalam warta dan bukan penyampaian Borang H. Dalam kes ini, Pengisytiharan Borang D berkenaan pengambilan yang dicadangkan diwartakan pada 21 Julai 2005. Permohonan kebenaran difailkan pada 6 Januari 2008. Perayu dengan jelasnya tidak

bertindak dengan segera atau dalam tempoh 40 hari yang ditetapkan di bawah A. 53 k. 3(6). Permohonan dengan nyata difailkan bertahun-tahun di luar tempoh masa yang ditetapkan.

(3) Undang-undang berhubungan dengan lanjutan masa untuk semakan kehakiman adalah jelas. Perayu tidak memohon lanjutan masa dan tidak memberikan alasan bagi kelewatan. Dengan itu, tiada asas yang memerlukan mahkamah melaksanakan kuasa budi bicaranya untuk melanjutkan masa.

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Arthur Ponniah Gurubatham & Satu Lagi lwn. Pentadbir Tanah Wilayah Persekutuan [2008] 3 CLJ 17 HC ***(refd)***

Abel v. Lee [1871] LR 6 CP 365 ***(refd)***

Chow Hong Lit lwn. YB Menteri Sumber Manusia Malaysia & Satu Lagi [1998] 5 CLJ 169 HC ***(refd)***

Enmore Estates Ltd v. Darsan [1970] AC 497, 506 ***(refd)***

Ex P Guan Teik Sdn Bhd (Substituting Lim Oo Guan, Deceased) [2010] 4 CLJ 289 FC ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Lee Lian & Ors v. PP [1956] 1 LNS 54 HC ***(refd)***

Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 SC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

PP v. Koo Cheh Yew & Anor [1980] 1 LNS 61 FC ***(refd)***

Quebec Railway, Light, Heat and Power Co Ltd v. Vandry [1920] AC 662 ***(refd)***

Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***

Ruslan Baharin Industries Sdn Bhd & Ors v. Kerajaan Malaysia [2010] 7 CLJ 713 CA ***(refd)***

Sh Gurbachan Singh v. SM Jagiro [1956] AIR Vol 43 ***(refd)***

Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys, Kuching Division & Anor [2004] 4 CLJ 775 HC ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

Wong Kin Hoong & Ors v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2011] 7 CLJ 1005 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 69(1)(4), 96

Federal Constitution, art. 13

Interpretation Acts 1948 and 1967, ss. 17A, 18(2)

Land Acquisition Act 1960, ss. 3(1)(a), 8(1), (4), 10(1), 11, 12, 14(1), (2), 16, 38, 53, 54

Rules of the High Court 1980, O. 53 rr. 3(3), (6)

Criminal Procedure Code [Ind], ss. 39(2), 488

Other source(s) referred to:
Bindra's Interpretation of Statutes (7th edn), p 491

For the appellant - Rosli Dahlan (Bahari Yeow & Ho Ai Ting with him); M/s Lee Hishamuddin Allen & Gledhill
For the 1st respondent - Azhar Abd Hamid; State Legal Adviser, Terengganu
For the 2nd respondent - Bastian Vendargon (PK Nathan & Gene Anand Vendargon with him); M/s Bastian Vendargon

[Editor's note: For the Court of Appeal judgment, please see Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2014] 1 CLJ 344.]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Zahari FCJ:

[1] In this judgment, unless expressly stated, reference to any legal provision refers to the Land Acquisition Act 1960, whilst reference to any rule refers to the Rules of High Court 1980, the rules which was in force at the material time.

Background

[2] The facts disclosed in the statement and affidavits filed in support of the application, and that filed by the respondents in opposition to the application, are these.

[3] The appellant is the registered owner of Lot PT No. 3168, Mukim Kijal, Daerah Kemaman Negeri Terengganu. Maju Timor Sdn Bhd (the second respondent in the High Court as well as in this appeal, subsequently referred to as "MTSB") is the owner of an adjacent land ie, Lot 33 Mukim Kijal, Daerah Kemaman, Negeri Terengganu.

[4] Pursuant to s. 8(1), a notice of intended acquisition in Form D, *inter alia*, of part of the appellant's land was issued by the Pentadbir Tanah Kemaman (the first respondent in the High Court as well as in this appeal, subsequently referred to as "the Land Administrator") for the public purpose of "Laluan Jalan Pantai Beris, Meraga, Mukim Kijal, Daerah Kemaman". This Form D was published in Warta Kerajaan Negeri *vide* gazette No. 469 on 21 July 2005.

[5] Thereafter, pursuant to ss. 10 and 11, the Land Administrator issued a notice in the prescribed Form E dated 28 February 2006 by which notice the appellant was informed that an enquiry would be held on 27 March 2006 at the Land Office Kemaman for the purpose of determining persons who has an interest in the lands to be acquired as specified in the schedule annexed thereto, as well as the amount of compensation to be awarded arising from the said acquisition.

[6] The Form E issued by the Land Administrator was served on the appellant on 7 March 2006. It is common ground that the Form E served on the appellant did not append the gazetted Form D (ie, the notice of intended acquisition) which had earlier been issued by the Land Administrator.

[7] It is not in issue that the appellant's representative was present at the enquiry before the Land Administrator on the date of hearing of 28 May 2006. It is also common ground that the appellant had objected to the acquisition of part of its land by the State Authority and had applied to the Menteri Besar Terengganu for a stay of the said acquisition. The appellant entertained suspicions that the acquisition exercise of part of its land was not for the declared public purpose held out in the gazetted Form D but rather, for the sole benefit of MTSB. It is also common ground that the hearing before the Land Administrator was adjourned several times on the application of the appellant.

[8] After several adjournments the Land Administrator proceeded with the hearing of the enquiry. At the conclusion of the enquiry on 3 August 2006, the Land Administrator made a written award in terms of Form G addressed to the three land owners (*inter alia*, the appellant) affected by the acquisition exercise pursuant to s. 14(1). A separate award was made by the Land Administrator for each affected area. This Form G had since been filed in the office of the Land Administrator pursuant to s. 14(2).

[9] On 27 November 2007 the appellant was served with a notice of award and compensation in terms of the prescribed Form H issued by the Land Administrator pursuant to the power conferred by s. 16. The appellant did not accept the sum awarded by the Land Administrator as compensation. The appellant gave notice in the Form H served upon them of its intention to challenge the said acquisition. The appellant did not, on the facts of this case, file an appeal in respect of the award made by the Land Administrator by filing the prescribed Form N pursuant to the remedy provided by s. 38.

[10] On 6 January 2008, the appellant filed an application for leave to apply for judicial review pursuant to O. 53 at High Court Kuala Terengganu ie, Originating Summons No. 13-01-2008 citing the Land Administrator, Pentadbir Tanah Kemaman, as the first respondent, and MTSB, another land owner, affected by the acquisition exercise, the company whom the appellant alleged the acquisition exercise was in favour of.

[11] A copy of the appellant's application for leave to apply for judicial review was then served on the Attorney General pursuant to O. 53 r. 3(6). By reason of the application being an *ex parte* one, the appellant did not serve a copy of the leave application and documents filed in support of the application on the putative respondents, the Land Administrator and MTSB.

[12] At the hearing of the *ex parte* application for leave a Senior Federal Counsel (SFC) appeared on behalf of the Attorney General. The SFC did not object to the appellant's application for leave. The court duly granted leave for the appellant to apply for judicial review on 20 May 2008.

[13] Having obtained leave, the appellant then, on 1 June 2008, filed its substantive application for judicial review as well as statement and affidavits in support of the application. The documents filed in respect of the substantive application was then served on the named respondents, the Land Administrator and MTSB.

[14] At the *inter partes* hearing of the substantive application MTSB raised two preliminary objections, ie, firstly, it was alleged that the appellant had not complied with the time frame prescribed by O. 53 r. 3(6); secondly, the appellant had failed to cite the proper party (ie, the State Authority) to the application. By reason of these non-compliance, MTSB contended that the appellant's application should be dismissed *in limine*.

[15] After hearing the submissions of the respective parties the learned High Court Judge on 21 June 2009 dismissed the appellant's application for judicial review. The appellant appealed to the Court of Appeal against the decision of the High Court. In his judgment dated 27 December 2011 the learned judge made no mention of the preliminary objections raised by MTSB but instead dealt with the application on its merits.

[16] At the hearing of the appellant's appeal against the High Court decision before the Court of Appeal, besides responding to the substantive issues in their submissions, MTSB raised the same preliminary objections which had earlier been raised in the High Court, which objections was supported by the State Legal Adviser Terengganu who appeared for the Land Administrator. The Court of Appeal adjourned the hearing of the appeal to enable the appellant to respond and submit on the preliminary objections raised by the respondents. On 1 August 2012 the Court of Appeal upheld the respondents preliminary objections. The appellant's appeal was then dismissed.

[17] In its judgment the Court of Appeal took note of the fact from the statement and supporting affidavit that the appellant's grievance was not so much with the award itself but against the acquisition itself. That the objection by the appellant was in respect of the acquisition of part of its land, not against the quantum of the award.

[18] On the objection of the State Authority not being cited as a party the Court of Appeal held:

> [12] Since the Land Acquisition Act 1960 is, subject to compensation, legislation that empowers a State Authority to deprive a person of his property, its provisions must be adhered to strictly (see *Ee Chong Pang & Ors v. The Land Administrator of The District Of Alor Gajah & Anor* [2013]

A 3 CLJ 649 CA. If a power is stated to be with the State Authority, it cannot be exercised by another. On the face of it, it appears that it follows that an action cannot be taken against another for the exercise of its power by the State Authority. The LAA 1960 only provides that the Land Administrator acts upon the decision of the State Authority to hold inquiry for the hearing of claims to compensation for all interests in such B land. An action against the decision of the State Authority cannot name the Land Administrator.

[19] On the issue when the 40 days prescribed in O. 53 r. 3(6) was to be computed, the Court of Appeal in its judgment held the 40 days prescribed in O. 53 r. 3(6) runs from publication of the State Authority's decision *vide* C the Form D in the gazette and not the service of Form H by the Land Administrator.

[20] The Court of Appeal then ruled that the two year time frame in s. 16 applied to the making of the award in Form G under s. 14(1), and not the giving of notice in Form H. The case of *Arthur Ponniah Gurubatham & Satu* D *Lagi lwn. Pentadbir Tanah Wilayah Persekutuan* [2008] 3 CLJ 17 was relied upon as authority for this ruling. As the award in Form G was made on 3 August 2006, the Court of Appeal ruled that the Land Administrator had acted well within the two year time frame, which commenced from the date of the gazetting of Form D, ie, on 21 July 2005.

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[21] The Court of Appeal ruled that the application for leave was, on the facts of this case, not filed within the prescribed time prescribed by the rules. There was no reasons advanced by the appellant warranting the exercise of the court's discretion to grant an extension of time in the appellant's favour.

F **[22]** On 30 July 2013, the Federal Court granted the appellant leave to appeal on the following questions of law:

(a) When leave to commence Judicial Review had been granted by a High Court and Judicial Review proper had been disposed by the High Court, in an appeal to the Court of Appeal, can a Respondent raise preliminary G objections (POs) that are the subject matter and properly belongs to proceedings at the Leave Stage or is a Respondent barred and estopped from raising such POs especially when the 1st Respondent had conceded to such leave being granted by the High Court;

(b) In an appeal to the Court of Appeal against a Judicial review by a High Court, whether a Respondent is deemed to have waived its rights to make H any PO and is estopped from ever raising it again if the Respondent had failed to raise it during the leave stage;

(c) In a land acquisition under the Land Acquisition Act 1960, whether Form H constitutes a final decision by the Pentadbir Tanah Daerah (PTD) to proceed and complete with the compulsory acquisition and tantamount I to a decision to reject a landowner's request appeal against such an acquisition;

(d) If the answer to (c) is in the affirmative, whether the 40 day time frame stipulated under Order 53 rule 3(6) of the Rules of High Court 1980 should run from date of service of Form H on the Appellant;

(e) Whether Form H of the PTD's award must be served and communicated to a land owner within 2 years as prescribed by section 8 (4) of the Land Acquisition Act 1960;

(f) Whether failure to serve Form H pursuant to section 8 (4) of the LAA 1960 would cause the acquisition to lapse and cease to have any effect.

The Appellants' Submissions

[23] It was submitted on behalf of the appellant that the learned judge erred in law and in fact in failing to take into consideration the failure by the Land Administrator to make and serve an award in Form H on the appellant within two years after Form D was gazetted. According to the appellant's counsel this was contrary to s. 8(4) and renders the Form D declaration of intended acquisition published in the gazette on 21 July 2005 to lapse, cease, terminate and of no effect.

[24] The fact that Form H was served on the appellant on 27 November 2007 was highlighted, as well as the fact that the application for leave to apply judicial review was filed by the appellant only on 6 January 2008. The appellant's counsel submitted there was no delay in filing the leave application for judicial review as it was filed within 40 days of service of Form H upon them. It was the appellant's case that there was no necessity for the appellant to apply for an extension of time as the application had been filed within 40 days of service of Form H upon the appellant (ie, 27 November 2007), which was the date when the 40 days start to run.

[25] On the objection as to whether the proper party had been cited in the application, the appellant's complaint in this case was against the decision of the Land Administrator in issuing Form H. The Land Administrator was therefore rightly named as a party to the application.

The State Legal Adviser's Submissions

[26] The State Legal Adviser submitted that the "decision" to acquire the lands pursuant to s. 3(1)(a) was a decision of the Terengganu State Government (Pihak Berkuasa Negeri) who had not been named as a party to the proceedings. The decision which was being challenged was clearly that of the State Authority, not that of the Land Administrator. The Form D exhibited was signed by the Terengganu State Director of Lands and Mines, not the Land Administrator. The Land Administrator was but only carrying out his statutory duties pursuant to the power conferred by the Act consequential upon the decision of the State Authority to acquire the lands specified in the gazetted Form D.

[27] As to when time runs for the purpose of computing the period prescribed in O. 53, the State Legal Adviser submitted that time runs from the date of publication of Form D in the gazette (ie, 21 July 2005) and not the service of Form H on the appellant.

[28] As to the publication of the decision of the State Authority in the gazette as a mode of communication of such a decision, reference was made to the case of *PP v. Koo Cheh Yew & Anor* [1980] 1 LNS 61; [1980] 2 MLJ 235 where the Federal Court, in discussing the application of s. 18(2) of the Interpretation Acts at pp. 239, 240, held as follows:

> The proper interpretation of statute by the courts requires the application of enacted law. In our view, s. 135(2) must be fully considered in the determination of the guilt or otherwise of the appellants. We consider that this subsection is in amplification and not in derogation of the publication in the Gazette.
>
> In the ordinary law, this publication (which is common ground) not merely affords the public in general and the appellants in particular 'a practical and sensible way' in which they could ascertain the ban on importation of goods originating from South Africa, but also constitutes sufficient notice of the ban: s. 18(2) Interpretation Act, 1967 (Rep 1973). And this rule as to notice by publication is to our mind reinforced by s. 135(2), so that we do not accept with respect the suggestion that the principle of *expressio unius exclusio alterius* applies. Whereas ordinarily the law presumes that the notice of the public has been sufficiently drawn to the ban by publication in the Gazette, s. 135(2) now establishes more positively and as a fact that this ban is to the knowledge of the appellants …

The Federal Court further held:

> In other words, if the law fixes the public with knowledge and deems the knowledge to be a fact and if as we have postulated, common sense and ordinary prudence and public policy require that every individual should so conduct himself as to keep at all times within the law, …

[29] The respondent's counsel submitted that the operative provision with regard to the gazetting of the State Authority's decision of notice of intended acquisition to acquire land for a public purpose was clearly s. 8. The publication in the gazette of the State Authority's decision of intended acquisition was a public notice to all persons, including the appellant, who is the registered proprietor of part of the lands to be acquired.

[30] The declaration of the intended acquisition of part of the appellant's land in Form D was gazetted on 21 July 2005. The application for judicial review was filed on 6 January 2008. Computing the 40 days from the date of the gazette notification of Form D, the leave application was clearly filed years beyond the prescribed 40 days period in O. 53 r. 3(6).

Decision

[31] Questions (a) and (b) will be considered together and can be answered shortly.

[32] The putative respondents were not present at the hearing of the application at leave stage as at that point in time, by reason of the application being an *ex parte* one, it was not served on the putative respondents. The respondents, not having been served with the *ex parte* leave application, were of course not present at the hearing of the leave application and were of course not present at the hearing of the leave application and accordingly, not in a position to raise any preliminary objection at that stage of the proceedings.

[33] Clearly the fact that the SFC did not object to leave being granted for the appellant to file the application for judicial review, did not, in my considered opinion, estop any of the respondents from raising the preliminary objections before the High Court Judge, at the *inter partes* hearing of the substantive application.

[34] Upon close scrutiny of the judgment of the High Court, it is clear that he dealt with the appellant's application on its merits. No ruling was made by the learned High Court Judge on the preliminary objections raised by MTSB. Upon examination of the Court of Appeal's judgment, it would appear that the Court of Appeal was not right in stating that rulings were made by the High Court Judge on the preliminary objections raised by MTSB.

[35] Was it then open for both of the respondents to raise the same preliminary objections at the hearing of the appellant's appeal against the decision of the High Court before the Court of Appeal? Was the Court of Appeal then right in entertaining the preliminary objections by the respondents at the appellate stage?

[36] On this issue I am of the following view. The Court of Appeal was certainly right and had the jurisdiction to do so. Decisions of this Apex Court had throughout the years consistently held that compliance with the time frame prescribed in the rules was fundamental as it goes to jurisdiction. In *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 2 MLJ 54, where the appellant was out of time and had not sought an extension of time nor accounted for the delay, the Federal Court had, on its own motion, raised the issue of the application being filed out of time and held that leave should not have been granted. The judgment of the Federal Court on this issue states as follows:

> At the outset of the hearing of this appeal we raised the question of the appellant being out of time in his application for leave for *certiorari* in the light of the provisions of O. 53 r. 1A of the Rules of the High Court, 1980,

A the relevant part of which specifically provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made. As the decision of the Minister sought to be impugned is dated 23 November 1981, the period of six weeks would, B on a computation under O. 3 r. 2(2) of the Rules of the High Court, expire on 5 January 1982, and as the application for leave was made on 9 January 1982 the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule. Apparently this point completely escaped all parties involved, as a result perhaps of an C affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. We took the point ourselves as it clearly goes to the jurisdiction of the court from which leave to apply for *certiorari* was sought as O. 53 r. 1(1) stipulates that no application for an order of *certiorari* shall be made unless leave therefore has been granted and r. 1A which we have already adverted to enacts that D leave shall not be granted except in accordance with its specific provisions.

[37] In *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 the Federal Court held as follows:

E ... Order 53 r. 1A of the Rules of the High Court, 1980 provides that leave to apply for an order of *certiorari* shall not be granted unless made within six weeks after the date of the proceeding objected to except where the delay is accounted for to the satisfaction of the Court or Judge to whom the application is made ...

F In our view the whole issue is clearly one of jurisdiction. In the event only the first consideration of the Judge is relevant. Since the Judge rejected the explanation for the delay it follows that the Court had no jurisdiction to hear the application for leave for an order of *certiorari*. Whether the application for an order of *certiorari* had merits or not was irrelevant. This principle is implicit in *Mersing Omnibus Sdn Bhd v. Minister of Labour and Manpower* [1983] CLJ (Rep) 266. There has been no jurisdiction to hear G the application for *certiorari* because Order 53 r. 1A of the Rules of the High Court 1980 expressly directs that leave shall not be granted unless the application is made within six weeks after the date of the proceeding.

[38] The cases of *Mersing Omnibus* and *Ravindran* was referred by the Federal Court recently in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan* H *Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161, 171 where the Federal Court arrived at the same conclusion when it held:

(30) In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the I delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[39] Applying the above principles to the facts of this case in determining whether the leave application filed by the appellant was within the time frame provided by the rules, an aggrieved person is required by O. 53 r. 3(6) to act "promptly", and in any event, not later than 40 days from "the date when the grounds for the application first arose" or "when the decision is first communicated" to the appellant. The intention of the rules in limiting a prescribed period must necessarily be construed to mean that it is the public interest that an aggrieved person's right of access to the court has to yield to the need for a swift finality of the decision in question.

[40] In respect of an acquisition of land situation, when a notice is given under s. 8(1), the State Authority is obliged to specify the particular land and areas intended to be acquired. It is for this purpose that a plan of the particular lands and areas so specified is prepared and kept so that the public can inspect the plan during normal office hours at the Land Office and the District Office of the area in which the said lands are situated.

[41] An award in Form G pursuant to s. 14(1) made by the Land Administrator when filed, "shall be final and conclusive evidence of the area of the scheduled land, of its value in the opinion of the Land Administrator, and of the apportionment of the compensation awarded, whether the persons interested have or have not appeared at the enquiry".

[42] The main thrust of the appellant's case rests on s. 8(4) which provision was inserted into s. 8 *vide* the Land Acquisition (Amendment) Act 1984 (Act A 575) with effect from 20 January 1984. According to s. 8(4), a declaration under s. 8(1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the gazette in respect of which the Land Administrator has not made an award under sub-s. 14(1) within a period of two years. In such a situation all proceedings already taken or being taken in consequence of such a declaration in respect of such land or such part of the land shall terminate and be of no effect.

[43] The critical issue in the questions posed is, when does the "40 days" as provided under O. 53 r. 3(6) start to run for the purpose of ascertaining whether the appellant had acted "promptly" from the date when the grounds for the application first arose or "when the decision is first communicated" to the appellant. Does it run:

(a) The date of the publication of Form D in the gazette (21 July 2005) as suggested by counsels for the respondents; or

(b) The service of award in Form H by the Land Administrator on the appellant pursuant to s. 8(4) (ie, on 27 November 2007), as suggested by the appellant's counsel.

[44] In the earlier part of this judgment I have stated my agreement with the decision of the Court of Appeal, that the impugned decision was a decision made by the State Authority, not the decision made by the Land Administrator.

[45] As to when the State Authority's decision of intention to acquire part of the appellant's land was "first communicated" to the appellant, I am in agreement with the submission of the respondents. The operative provision which governs the mode of communication of such a decision is clearly s. 8(1). Section 8(1) is the operative provision with regard to the notification of the State Authority's decision of its intention to acquire which land, or part of land and for what purpose. In respect of an acquisition of land the publication of such an intention in the gazette in terms of the Form D affords the public, and the appellant in particular, the most practical and sensible way in which to give notice of the State Authority's intended acquisition. Giving the words in s. 8(1) its plain and ordinary meaning, the intention of the legislature presumes that the notice of the public has been sufficiently drawn to the acquisition by way of publication in the gazette. Section 8(1) establish positively and as a fact that this acquisition is to the knowledge of the appellant. I am of the view that if the law fixes the public with knowledge, and deems such knowledge to be a fact, this court must necessarily give effect to it.

[46] I am further of the view that the Court of Appeal was right in ruling that the filing of the application for leave to apply judicial review for an order of *certiorari* must be filed within 40 days of the publication of Form D in the gazette and not the service of Form H. In this case the Form D declaration of the intended acquisition was gazetted on 21 July 2005. The leave application was filed 6 January 2008. The appellant had clearly not acted "promptly" nor within 40 days prescribed in O. 53 r. 3(6). The application clearly was filed years beyond the time frame prescribed in O. 53 r. 3(6).

[47] The Court of Appeal was in my view also right in stating that the law relating to extension of time for judicial review was clear. The appellant had not applied for an extension of time and given no reason for delay. There was thus no basis warranting the court to exercise its discretionary power to extend time.

[48] In conclusion, on my part, I would answer the first limb of question (a) in the affirmative. The second limb of question (a) and (b) need not be answered. These questions does not arise as the Land Administrator was not present at the hearing of the *ex parte* leave application.

[49] On the questions posed in paras. (c), (d), (e) and (f), I am of the view there is also no necessity to answer these questions in view of my finding that the Court of Appeal was right in ruling that the challenge was against the decision of the State Authority to acquire part of the appellant's land, and not the quantum made by the Land Administrator.

[50] For the above reasons this appeal is dismissed with costs.

Ramly Ali FCJ:

Introduction

[51] This is an appeal, by the appellant, Kijal Resort Sdn Bhd against the unanimous decision of the Court of Appeal dated 1 August 2012 dismissing the appellant's appeal on preliminary objections against the decision of the High Court dated 21 June 2009 dismissing the appellant's application for judicial review to quash the decision of the Land Administrator. The appellant had on 30 July 2013 obtained leave to appeal to the Federal Court pursuant to s. 96 of the Courts of Judicature Act 1964 (CJA 1964).

Factual Background

[52] The appellant, at all material times, was the registered proprietor of part of the land known as Lot 3168, Mukim Kijal, Daerah Kemaman, Negeri Terengganu. The State Authority of Terengganu had decided to acquire the said land for public purpose. For that purpose an official notification as in Form D of the Land Acquisition Act 1960 (the LAA) was gazetted in the government gazette on 21 July 2005 pursuant to s. 8(1) of the Act. The acquisition exercise also included part of the adjacent land, known as Lot 33, Mukim Kijal, Daerah Kemaman, Negeri Terengganu, belonging to the second respondent.

[53] Subsequently, a notification in Form E of the LAA was issued on 28 February 2006 and served on the appellant on 7 March 2006. Later the first respondent served upon the appellant a notice of award in Form H of the LAA dated 27 November 2007. By letter dated 19 December 2007, the appellant rejected the award and indicated its intention to set aside the entire award and the acquisition.

[54] The appellant then filed an *ex parte* application in the High Court on 6 January 2008, for leave to proceed with judicial review pursuant to O. 53 r. 3 of the RHC 1980, naming the Pentadbir Tanah Daerah, Kemaman as the first respondent and a company known as Maju Timor Sdn Bhd as the second respondent. As required by O. 53 r. 3(3) of the RHC 1980, the appellant had given to the Attorney General Chambers a notice of the application. Accordingly, a Senior Federal Counsel from the Attorney General's Chambers was present at the hearing of the *ex parte* application. The first and second respondents were neither present nor represented and did not participate at the *ex parte* leave stage. Leave was accordingly granted to the appellant to proceed with the judicial review, on 20 May 2008.

[55] Pursuant to the leave granted, the appellant filed its substantive application for judicial review on 1 June 2008 and served the same on the first and second respondents, who then filed their respective affidavits in reply and opposition to the application. The second respondent was named as a party in the proceedings as it was alleged that the acquisition was *ultra vires* the LAA because it was for the sole benefit of the second respondent.

[56] At the hearing of the substantive judicial review application, the second respondent raised preliminary objections on two points, namely:

(a) That the judicial review application was filed outside the stipulated 40 days period provided for under O. 53 r. 3(6) of the RHC 1980 (the applicable provision then) and consequently the application should be dismissed *in limine* (first objection); and/or

(b) That the proper party, the State Authority, was not named as the respondent (second objection).

[57] Apparently from the notes of proceedings and the grounds of judgment, the High Court did not deal with the two preliminary points at all; instead it proceeded to hear substantive submissions on the application for judicial review and on 21 June 2009 dismissed the application with costs on merit of the substantive issues. The learned High Court Judge did not mention anything about the two preliminary objections raised by the second respondent in his ground of judgment.

[58] On appeal by the appellant to the Court of Appeal, the second respondent, once again raised the two preliminary objections when the case came up for hearing on the first date on 25 June 2012. The hearing was postponed to 31 July 2012, to give the appellant sufficient time to rebut the two preliminary objections. On 31 July 2012, the Court of Appeal heard submissions from the parties on the two preliminary objections and on 1 August 2012, the Court of Appeal upheld the objections and accordingly dismissed the appeal with costs.

[59] On 30 July 2013, the appellant was granted leave to appeal to the Federal Court against the decision of the Court of Appeal on the following questions:

(a) Whether Form H of the Land Administrator's award must be served and communicated to a landowner within two years as prescribed by s. 8(4) of the Land Acquisition Act 1960 ("LAA 1960") (Question 1);

(b) Whether failure to serve Form H pursuant to s. 8(4) of the LAA 1960 would cause the acquisition to lapse and cease to have any effect (Question 2);

(c) In a land acquisition under the LAA 1960, whether Form H constitutes a final decision by the Land Administrator to proceed and complete with the compulsory acquisition and tantamount to a decision to reject a landowner's request/appeal against such and acquisition (Question 3);

(d) If the answer to Question 3 above is in the affirmative, whether the 40 days time frame stipulated under O. 53 r. 3(6) of the Rules of the High Court 1980 should run from date of service of Form H on the appellant (Question 4);

(e) When leave to commence judicial review had been granted by a High Court and the judicial review proper had been disposed of by the High Court, in an appeal to the Court of Appeal, can a respondent raise preliminary objection that are the subject matter and properly belongs to the proceedings at the leave stage or is a respondent barred and estopped from raising such preliminary objection especially when the respondent had conceded to such leave being granted by the High Court (Question 5); and

(f) In an appeal to the Court of Appeal against a judicial review by a High Court, whether a respondent is deemed to have waived its rights to make any preliminary objection and is estopped from ever raising it again if the respondent had failed to raise it during the leave stage (Question 6).

At The Federal Court

[60] We shall now deal with all the questions posed.

[61] Question 1 and Question 2 relate to the issue of service of Form H of the Land Administrator's award ie, whether it must be served and communicated to a land owner within two years as prescribed by s. 8(4) of the LAA; and whether failure to serve it would cause the acquisition to lapse and cease to have effect.

[62] The relevant section to be considered in determining this issue is s. 8(4) of the LAA, which provides:

> (4) A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under subsection 14(1) within the said period of two years, and accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.

[63] The appellant contended that the two years period stipulated in s. 8(4) of the LAA is to be calculated from the date of the gazette of Form D to the date of issuance of Form H; while on the other hand, both the respondents contended that the two years period is to be calculated from the date of the gazette of Form D to the date of issuance of Form G, but not Form H.

[64] The appellant submitted, that Form G is clearly intended only for the internal use of the Land Administrator and does not constitute a communication of the award to the land owner. Form G would not be made available to the interested parties until a notice of the award in Form H is served on them. To the appellant, Form H must be served and communicated to the land owner within two years from the date of the gazette of Form D and the failure to do so would cause the acquisition to lapse and cease to have any effect.

[65] The wordings of s. 8(4) of the LAA on this point is clear and unambiguous ie, the declaration in question "shall lapse and cease be of any effect on the expiry of two years after the date of its publication in the gazette in so far as it is relates to any land or part of any land in respect of which the Land Administrator has not made an award under sub-s. 14(1) within the said period of the two years ...". In other words, the two years period starts from the date of publication of the declaration in Form D in the gazette to the date when the Land Administrator made an award under sub-s. 14(1) of the same Act. The declaration would only be valid and effective if the award is made within the two years period.

[66] Section 14(1) of the LAA provides:

> (1) Upon the conclusion of the enquiry under section 12 relating to any scheduled land the Land Administrator shall prepare a written award under his hand in Form G, in which he shall in respect of each separate area of scheduled land, make a separate award in respect of each person whose interest in the land has been established in such enquiry.

[67] Form G is a written award prepared by the Land Administrator upon the conclusion of an enquiry under s. 12. The purpose of the said enquiry is to determine the value of the scheduled land and to assess the amount of compensation appropriate in each case. In the enquiry the Land Administrator must also determine the respective interest of all persons claiming compensation or who in his opinion are entitled to compensation in respect of the scheduled land. Only upon the conclusion of the enquiry when all relevant determinations are made pursuant to s. 12, the Land Administrator shall prepare a written award under his land in Form G.

[68] Form H comes into the picture at a later stage. It is issued by the Land Administrator under s. 16 of the LAA which provides:

> (1) On making any award under subsection 14(1) in respect of any scheduled land the Land Administrator shall prepare and serve on each person interested in such land a notice in Form H.
>
> (2) Every notice in Form H shall include an extract from the written award of the Land Administrator in Form G, relating to the land in which the person to whom such notice is addressed has an interest.

[69] Under s. 14(2) of the LAA, every award in Form G shall be filed in the office of the Land Administrator and shall be final and conclusive evidence of the area of any scheduled land, of its value and of the apportionment of the compensation awarded by the Land Administrator. There is no provision for Form G, by itself, to be served on anyone. What need to be served on each person interested in the land is Form H which shall include an extract from the written award in Form G.

[70] Reading s. 8(4) of the LAA together with other relevant sections, particularly ss. 12, 14 and 16, of the same Act it is plain and unambiguous that what need to be done by the Land Administrator after the publication

of Form D in the gazette is to conduct and conclude an enquiry under s. 12, and upon such conclusion of the enquiry the Land Administrator shall within the period of two years from the date of the gazette prepare a written award in Form G. If no award is made and Form G is not prepared by the Land Administrator within the two years period, the declaration in Form D shall lapse and cease to be of any effect. There is no provision in the LAA which indicates that Form H must be served on or communicated to the land owner within two years, from the date of publication of Form D in the gazette.

[71] It is a settled rule of statutory interpretation that if the precise words used are plain and unambiguous, the court is bound to construe them in their ordinary sense. This has been stressed in *Bindra's Interpretation of Statutes* (7th edn.) at p. 491 in the following passage:

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak of the intention of the legislature. If any statutory provision is capable of only one construction then it would not be open to the court to put a different construction upon the said provision merely because the alternative construction would lead to unreasonable or even absurd consequence. The question of consequences and considerations of policy would be relevant only where the provisions sought to be construed is capable of two constructions. In such a case the court is not concerned with the results which may ensue from giving to the plain meaning of the words used by the legislature. If these results are unfortunate, it is for the legislature to take action to remedy the defects of the law as enacted; it is not for the courts to usurp the functions of the legislature and by straining the meaning, and ignoring the clear terms of the law to seek to evade consequences which, in the opinion of the court, may prove ill-fraught.

[72] In *Abel v. Lee* [1871] LR 6 CP 365, Willes J said: "I utterly repudiate the motion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it accordance with his views so as to what is right and reasonable".

[73] The above authorities were adopted by the Federal Court in the case of *Ex P Guan Teik Sdn Bhd (Substituting Lim Oo Guan, Deceased)* [2010] 4 CLJ 289; [2010] 1 MLJ 1.

[74] In the present case before us Form D was published in the gazette on 21 July 2005 *via* Gazette Notification No. 469 and the award in Form G pursuant to s. 14(1) of the LAA, was made on 3 August 2006. For the purpose of s. 8(4) of the LAA, the said award in Form G was well within the two years period from the date of the gazette of Form D.

[75] That being the case the issue of failure to serve Form H in the context of s. 8(4) of the LAA as raised by the appellant in Question 2 does not arise. Section 8(4) only relates to the making of an award and preparing Form G

by the Land Administrator. It does not relate to service of Form H to the land owner or other interested parties. Therefore the answer to Question 1 must be in the negative.

[76] Question 3 and Question 4 relate to procedure for the appellant as the landowner to challenge the decision of the Land Administrator in the acquisition exercise involving its land. This relates to an application for judicial review under O. 53 of the RHC 1980 (now the ROC 2012). The issue to be determined is when does the 40 days period as stipulated under O. 53 r. 3(6) of the RHC 1980 (the relevant rules applicable at the material time) starts to run. The appellant is contending that the time frame should run from the date of service of Form H on the appellant; while the respondents on the other hand are contending that it should run from the date of publication of Form D in the gazette.

[77] At the *inter partes* hearing of the substantive application for judicial review (after leave was earlier granted *ex parte* 20 May 2008), the second respondent raised preliminary objections on two points, namely:

(a) That the judicial review proceedings was filed outside the stipulated 40 days period under O. 53 r. 3(6) of the RHC 1980; and/or

(b) That the proper party, the State Authority, was not named as the first respondent.

[78] The High Court Judge after hearing submissions on the objections, did not deal with the two preliminary points raised. Instead the learned judge proceeded to hear the substantive arguments on merit and later dismissed judicial review application on merit.

[79] At the Court of Appeal, the second respondent raised the same preliminary objections on the two points. This was supported by the State Legal Advisor who appeared for the first respondent. The Court of Appeal heard all parties and upheld the preliminary objections and thereafter ruled in favour of the respondents. Thus, on these grounds alone, the Court of Appeal held that the judicial review proceedings were fatally flawed and ought to be dismissed *in limine*. The appellant's appeal was therefore unanimously dismissed without hearing or considering the merits of the substantive appeal.

[80] According to the appellant's counsel, the brief oral grounds given by the Court of Appeal in relation to the first objections, are as follows:

(a) The judicial review application was not brought within the 40 days times frame stipulated under O. 53 r. 3(6) of the RHC 1980; and

(b) The 40 days times frame should run from the date of publication of Form D in the official gazette (dated 21 July 2005), and not from the issuance of the award in Form H (dated 27 November 2007).

[81] The Court of Appeal further ruled: "The publication in the gazette is a public notice to all persons: see s. 18 Interpretation Act 1948 and 1967 (Consolidated and Revised 1989) (Act 338). This is the operative provision with regard the notification of the decision to acquire for a public purpose". A

[82] Judicial review application was at the relevant time governed by O. 53 of the RHC 1980 (now the Rules of Court 2012). Order 53 r. 3(6) of the RHC 1980 provides that an application for judicial review shall be made promptly, and in any event, within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant. In relation to matters relating to land acquisition under the LAA, an applicant can only exercise his right to apply for judicial review when the decision which he intends to challenge is communicated to him. In other words, the decision must have been brought to his actual notice or knowledge in order for him to prepare his case. B C

[83] In order to bring O. 53 r. 3(6) of the RHC 1980 into play, it is crucial to first identify what the decision that is sought to be impugned or challenged by the applicant in the judicial review proceedings. (see: *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704, Court of Appeal). For that matter, the court must refer to the application for leave for judicial review made by the applicant. In the present case, the application for leave was made *ex parte* on 6 January 2008, supported by an affidavit affirmed by one Tan Sri Dato' Alwi Jantan. D E

[84] Prayer 1 of the said leave application prays to an order of *certiorari* to set aside the decision of the first respondent to acquire part of the applicant's land known as Lot 3168, Mukim Kijal, Daerah Kemaman, in the State of Terengganu, which was published in the government gazette dated 21 July 2005. Close examination of the statements as found in the affidavit-in-support of the leave application show that the appellant's grievance was not so much on the award of compensation but on the acquisition of the land in question. The objection by the appellant at all material times was in respect of the acquisition of its land, not the quantum of the award made by the Land Administrator. F G

[85] When was the said decision to acquire the land first communicated to the appellant? The word "communicate" is not expressly defined in the RHC 1980. It is also not expressly defined in the LAA. The *Oxford Advanced Learner's Dictionary* defines "communicate" as "to make something known to somebody"; "to pass something on; to transmit something"; "to make one's idea, feelings etc. clear to others". In the *Macmillan English Dictionary for Advanced Learners* (New Edition), the word "communicate" is explained as "to express thoughts, feelings, or information to another person ... for example by speaking or writing"; "to let someone knew what you are feeling or thinking". It is further explained as follows "when people communicate; it is as if their thoughts and ideas travel between one person and the other; or are sent from one person to another". H I

[86] In the case of *Sh Gurbachan Singh v. SM Jagiro* [1956] AIR Vol 43, Punjab Section, p. 254, Bhandari CJ, ruled that the expression "communicate" is not synonymous with the expression "publish" which mean "to make public". It means "to bestow convey make known, recount, to import as to communicate information to anyone".

[87] In that case, the validity of an order of a second class Magistrate dated 22 January 1955 (made under s. 488 of the Indian CPC) was challenged on the ground that the learned Magistrate did not exercise the powers of a Magistrate of a first class on 22 January 1955 as a copy of the notification by which the Magistrate was invested with the powers of a Magistrate of the first class, though dated 3 January 1955, was only sent to him on 8 February 1955 and published in the local official gazette on 18 February 1955. The relevant rule (ie, s. 39(2) of the Indian CPC) declares that an order conferring Magisterial powers on a person "shall take effect on the day on which it is communicated to the person concerned".

[88] The court held that as the order investing the Magistrate with powers of a first class Magistrate was not communicated to him till 8 February 1955 and as he did not exercise the powers of a first class before that date, it was not within his competence to make an order under s. 488 of the CPC on 22 January 1955; the order under s. 488 was therefore void and set aside.

[89] The clear indication in the above case is that "the day on which it is communicated to the person concerned" as stipulated in the relevant s. 39(2) of the Indian CPC, refers to the day when a copy of the notification was actually sent to the Magistrate concerned on 8 February 1955, but not the day when the said notification was issued on 3 January 1955, nor the day when it was published in the official gazette on 18 February 1955.

[90] The above decision is clearly in line with the literal meaning of the word "communicate" as defined in the various dictionaries cited above. On the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of the law legislated and it is presumed that if a word or phrase appears in a legislation, it was put there for a purpose and must not be disregarded. (See: *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35 (Supreme Court); *Quebec Railway, Light, Heat and Power Co Ltd v. Vandry* [1920] AC 662; and *Enmore Estates Ltd v. Darsan* [1970] AC 497, 506).

[91] Abdoolcader SCJ in *Foo Loke Ying* (*supra*) had made a very interesting observation on this issue when His Lordship said:

> We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question that is its proper and must know signification. Some three months ago Lord Scarman in delivering the leading judgment of the House of Lords in *South West Water Authority v. Rumble's* [1985] 2 WLR 405 said (at p. 411):

> ... the language of the two paragraphs consists of ordinary English words which possess by their very imprecision the flexibility which is the hallmark of the English language, and which is one of the reasons for survival of English as a living and worldwide tongue. I have no doubt that it would be contrary to the legislative purpose of the enactment to restrict or refine their breadth and flexibility in the context of this legislation, which has to cover a wide range of circumstances and situations present and future. A restrictive interpretation of the legislature's language would defeat the broad purpose of this innovative and reforming statute.
>
> We are of the view that the provisions of the Act under consideration before us call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment.

[92] In order to determine the issue before us in the present appeal, the words "the date when the decision is first communicated to the applicant" as found in O. 53 r. 3(6) of the RHC 1980 must be read together or in the context of the relevant provisions of the LAA relating to land acquisition proceedings. All those relevant provisions must be interpreted based on "a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment".

[93] It is perhaps necessary to refer to some relevant provisions of the LAA and the relevant forms issued relating to land acquisition proceedings under the said Act.

[94] When the State Authority decides that lands are needed for public purposes, a declaration of intended acquisition in Form D, may be issued under s. 8 of the LAA which provides:

> 8. Declaration that land is required for a public purpose
>
> (1) When the State Authority decides that any of the lands referred to in section 7 are needed for any of the purposes referred to in section 3, a declaration in Form D shall be published in the Gazette.
>
> (2) A copy of the list of lands referred to in paragraph 7(b), amended, if necessary, in accordance with the decision of the State Authority, shall be included as a schedule to the declaration in Form D.
>
> (3) A declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified therein.
>
> (4) A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award

A under section 14(1) within the said period of two years, and, accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.

(5) Where the declaration under subsection (1) has lapsed, subsections
B 35(2), (3) and (4) shall apply with the necessary modifications.

[95] Form D is a declaration of an intended acquisition of land required for a public purpose. The list of lands referred to in Form C must be included as a schedule to Form D. The declaration shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the gazette
C in so far as it relates to any land in respect of which the Land Administrator has not made an award in respect of each person whose interest in the land has been established in an enquiry under s. 14 of the Act. Where the declaration has lapsed, all proceedings already taken or being taken in consequence of such declaration in respect of such land shall terminate and
D be of no effect.

[96] Form D needs to be published in the gazette. There is no requirement that it must be served on anybody (otherwise than by notification in the gazette).

E **[97]** The actual commencement of proceedings for land acquisition is by giving public notice in Form E under s. 10 of the LAA. Section 10 provides:

10. Land Administrator to commence proceedings

(1) The Land Administrator shall, having completed the action required by section 9, commence proceedings for the acquisition of the land
F by giving public notice in Form E in the manner prescribed by section 52, and by fixing the date of an inquiry for the hearing of claims to compensation for all interests in such land.

(2) The Land Administrator shall not hold such inquiry earlier than twenty-one days after the date of publication of the notice referred to in subsection (1).
G

(3) A copy of the schedule to the declaration in Form D gazette under subsection 8(2) shall be appended to every notice in Form E.

[98] Section 10(1) of the LAA clearly stipulates that "the Land Administrator shall ... commence proceedings for the acquisition of the land
H by giving public notice in Form E in the manner prescribed by s. 52 ..." ie, by causing copies of such notification declaration or document to be posted at the District Land Office, on public notice boards in the mukim or township in which the land is situated and in such other places on or near the land in question as the Land Administrator may think fit. There is no
I indication in the LAA that Form E must be published in the gazette.

[99] Section 11 of the LAA provides for specific and express provisions on the requirement that copies of such notice in Form E must be served in the manner prescribed by s. 53, upon:

(a) the occupier of such land;

(b) the registered proprietor of such land, where he is not the occupier thereof;

(c) any person having a registered interest in such land; and

(d) any person whom he knows or has reason to believe to be interested therein.

This requirement is "in addition to giving public notice as required by section 10(1)". It is a mandatory requirement for the Land Administrator to commence proceedings for the acquisition of lands under the LAA.

[100] Form E must be served in the manner prescribed by s. 53, which provides as follows:

53. Service of notices

(1) Service of any notice or other document under this Act shall, subject to section 54, be made by delivering or tendering a copy thereof, duly signed by the Land Administrator or other proper authority, either:

(a) to the person to whom the notice is addressed or, if he cannot be found;

(b) to any adult member of his family residing with him,

and by obtaining the signature of the person to whom such copy is delivered or tendered to an acknowledgement of service endorsed upon the original document or an office copy thereof, or entered in a book to be kept for that purpose.

(2) If the person to whom any copy referred to in subsection (1) is delivered or tendered is unwilling or unable to sign the acknowledgement thereof, or if no proper person can be found on whom to effect service, service may be effected by fixing a copy thereof:

(a) upon the outer door of the building in which the person therein named ordinarily dwells or carries on business; and

(b) on any public notice-board in the town, village or mukim in which the person to be served usually resides.

(3) Where the person to be served is the occupier of any scheduled land specified in any notice then, failing personal service, a copy of the notice shall also be posted in some conspicuous part of such land.

A (4) In each of the cases referred to in subsections (2) and (3) the serving officer shall enter on the original of the document served, or on an office copy thereof, or in a book to be kept for the purpose, a statement of the time, place and manner in which he effected the service, and shall sign such statement.

B **[101]** Section 53 stresses on strict compliance of service of notices or other documents relating to land acquisition upon the occupier or registered proprietor as well as person having a registered interest in such land. Those notices or documents, duly signed by the Land Administrator must be delivered or tendered a copy thereof to the person to whom the notice is C addressed or, if he cannot be found, to any adult member of his family residing with him. The signature of the person to whom such copy is delivered or tendered must be obtained and endorsed upon the original document or an office copy thereof; and such endorsement must be entered in a book to be kept for that purpose.

D **[102]** In the event that service of the notice or document cannot be done effectively under s. 53, s. 54 of the Act provides that the Land Administrator must proceed to effect service upon an agent authorised to receive service on behalf of the party or upon a person entitled to act for such party, or where there is no such agent or person entitled to act within the state, effect service E by sending the notice by registered post to the party if after reasonable inquiry, his address can be ascertained, and where he considers that publication in a newspaper is desirable, publish the notice in such local newspaper circulating in the state as he thinks fit.

[103] The clear indication of s. 11 read together with s. 53 and s. 54 of the F LAA is that Form E, the relevant document to commence proceedings for land acquisition under the Act together with a copy of the schedule to the declaration in Form D, must effectively be delivered and communicated to the interested persons, particularly the occupier or the registered proprietor of such land. The relevant notice and information relating to the acquisition G must be brought to the actual knowledge of the persons concerned; and sufficient proof acknowledging the service of the documents by the person to whom such documents are delivered must be obtained and entered in an official book to be kept for that purpose.

[104] With the comprehensive and elaborate provisions in ss. 10, 11, 53 H and 54 of the LAA, we can safely conclude that a mere publication in the gazette of a notification or declaration in Form D under s. 8(1) of the same Act is clearly insufficient for the purpose of communicating the decision relating to the land acquisition to the interested persons concerned. Our view is that for the purpose of O. 53 r. 3(6) of the RHC 1980, Form E of the LAA I which commences proceedings for the acquisition of land together with the schedule attached thereto, and served on the interested persons in the manner prescribed by the relevant express specific provisions in the LAA, can be

construed as the first communication to the appellant, being the registered proprietor of the land in question, of the decision by the State Authority to acquire its land in question. This interpretation is in line with the provisions of s. 17A of the Interpretation Acts 1948 and 1967 (Act 338) which provides that: "in the interpretation of the provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object".

[105] The Court of Appeal in the present case relied on the provisions of s. 8(1) of the LAA read together within s. 18 of the Interpretation Acts 1948 and 1967 in coming to its conclusion that the date when the said decision was first communicated to the appellant was when the declaration in Form D was published in the gazette; and therefore the 40 days' time frame as stipulated under O. 53 r. 3(6) of the RHC 1980 starts to run from such date of publication.

[106] Our view is that s. 18 of the Interpretation Acts 1948 and 1967 is a general provision applicable to interpretation of all relevant written laws. Under s. 18(2), publication in the official gazette shall constitute sufficient notice of any matter required to be published in the gazette by or under any federal law; whereas ss. 10, 11, 52, 53 and 54 of the LAA are specific provisions in the LAA specifically to impress that the notification in Form E thereunder must necessarily be served or communicated to the interested persons who are likely to be affected by the land acquisition in question, in the manner prescribed thereunder. The words "constitute sufficient notice of any matter required to be published in the gazette by or under any federal law ..." cannot override the effect of those relevant sections in the LAA. It cannot be construed that by the publication in the gazette, the State Authority had "communicated" the said notification or declaration to the appellant for the purpose of O. 53 r. 3(6) of the RHC 1980. Giving effect to the relevant sections in the LAA, as discussed above, the said notification or declaration was only "first communicated" to the appellant when Form E was served on or delivered to it on 11 July 2011.

[107] It is a well-known rule of construction that specific provision overrides general provision. (See: *Lee Lian & Ors v. PP* [1956] 1 LNS 54; [1956] MLJ 191; and *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332; [1997] 2 MLJ 271).

[108] The relevant specific provisions in the LAA must be given effect in interpreting the issue of service or communication of the notification or declaration to the interested persons in matters relating to land acquisition in the Act. On this issue, we are in agreement with the observation made by Eusoffe Abdoolcader SCJ in delivering judgment of the Supreme Court in *Foo Loke Ying v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35:

A ... A court is not at liberty to treat words in a statute as mere tautology unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavor to give significance to every word of an enactment, and it is presumed that is a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ...

B

[109] By the acquisitions of the land, the appellant was deprived of its right to own the property. As such it would only be just and fair that the decision to acquire the lands be brought to the appellant's actual knowledge by way of communicating the same to the appellant. The rights of a citizen to property under art. 13 of the Federal Constitution could only be deprived in accordance with law and that an actual or express notice (as opposed to a constructive notice by way of a gazette) of such deprivation ought to have been given to the citizen. The appellant cannot be expected to apply for leave to commence judicial review to challenge the deprivation of its rights to the property unless it has knowledge or is made aware of such deprivation and this could only happen when the appellant is served with the actual or express notice that its right has been infringed. The first written notice (in the form of Form E) required to be issued and served on the appellant, as registered proprietor of the said lands, under the LAA is Form E issued pursuant to s. 10(1) of the Act.

C

D

E

[110] There are a number of authorities locally to support the finding that for the purpose of O. 53 r. 3(6) of the RHC 1980, the 40 days time frame would only start to run when the applicant had actual knowledge of the relevant decision or that the applicant had been served in accordance with relevant provisions of the LAA.

F

[111] In *Wong Kin Hoong & Ors v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2011] 7 CLJ 1005, the Kuala Lumpur High Court dismissed the applicant's application for leave for judicial review on the ground that there was inordinate delay in making the application under O. 53 r. 3(6) of the RHC 1980 and no good reason to grant an extension of time. The learned High Court Judge found that the application was made more than 11 years from the time the first decision was made known to the public, and more than one year from the time it was communicated to the appellant. The learned High Court Judge found the applicants had actual knowledge of the approval of the EIA Report as of 8 January 2007, a period in excess of one year prior to the institution of the application for leave under O. 53 r. 3(6) of the RHC 1980.

G

H

[112] The learned High Court Judge made her finding on the 40 days period stipulated under O. 53 r. 3(6) based on the actual knowledge of the decision being communicated to the applicants.

I

[113] On appeal, the Court of Appeal and the Federal Court agreed with the finding and reasoning of the learned High Court Judge on this issue and found no reason to interfere with the judge's exercise of discretion.

[114] In *Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys, Kuching Division & Anor* [2004] 4 CLJ 775; [2005] 2 MLJ 555, the High Court in Kuching *inter alia* came to the same finding ie, the 40 days period under O. 53 r. 3(6) of the RHC 1980 starts to run when the plaintiff first came to know about the Minister's Direction dated 14 November 2001 extinguishing the alleged notice customary rights of the plaintiff, when the plaintiffs submitted their claims for compensation on 4 March 2002, even though the said Minister's Direction was published in the Government Gazette on 14 November 2001.

[115] In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* (*supra*), the Court of Appeal held that for the purpose of O. 53 r. 3(6) of the RHC 1980, time started to run against the appellants when the appellants first knew of the decision on 8 November 2003 when their representative met with the planning officer of the DBKL. It seems to suggest that the meeting with the representative of the DBKL evidenced that the appellants had actual knowledge of the said decision. However, the Court of Appeal held that "taking 8 November 2003 as the latest date the decision was communicated, calculated to 14 February 2005 ie, the date of filing this application for the judicial review there clearly had been inordinate delay in breach of O. 53 r. 3(6) of the RHC".

[116] We are of the view that an application for leave for judicial review made under O. 53 r. 3(6) of the RHC 1980 challenging the decision of the State Authority declaring that the land is to be acquired under the LAA, must be filed within 40 days from the date when the decision was first communicated to the applicant ie, on the date when the notice of enquiry in Form E which appended a copy of the schedule to Form D was served pursuant to s. 10 of the LAA on the registered proprietor or occupier of the land pursuant to ss. 11, 52, 53 and 54 of the LAA.

[117] In the present case before us, Form E was served on the appellant on 7 March 2006. Application for leave for judicial review was filed on 6 January 2008 ie, almost 22 months after Form E was served on the appellant; or in other words, 22 months after the decision to acquire the land in question was first communicated to the appellant. This is clearly a beyond the 40 days time frame as stipulated in O. 53 r. 3(6) of the RHC 1980. There had been inordinate delay on the part of the appellant in filing for judicial review. There is no indication to show that the appellant had applied for an extension of time.

[118] Form H cannot be the starting point to calculate when the 40 day time frame under O. 53 r. 3(6) of the RHC 1980 starts to run as contended by the appellant. Form H is issued based on the award by the Land Administrator under s. 14(1) of the Act. It includes an extract from the written award of the Land Administrator in Form G. It is a notice of award and offer of compensation in respect of the land acquired. It does not convey the decision of the State Authority to acquire the land (which forms the subject matter of the judicial review). The said decision was earlier conveyed to the appellant *vide* Form E with the schedule appended to it, which the appellant had earlier received on 7 March 2006. It was through Form E with the schedule that the decision of the State Authority to acquire the land was "first communicated" to the appellant as the registered owner of the land in question.

[119] Order 53 of the RHC 1980 sets out a specific procedure for an applicant to comply with in order to enable him to invoke the judicial review proceedings. When such explicit procedure is created, then as a general rule all applicants for such relief must adhere to the procedure, failing which the application would not be entertained by the court. In the present case, there was clear non-compliance by the appellant with the imperative requirement of time set under O. 53 r. 3(6) of the RHC 1980.

[120] It is trite law, that strict compliance with the requirements of O. 53 r. 3(6) of the RHC 1980 is mandatory. The mandatory nature of the requirements is clearly reflected in the usage of the word "shall" therein, which means that there can be no exceptions unless an extension of time has been applied for and obtained.

[121] A prompt action to apply for a judicial review is therefore necessary, for non-compliance with the requirement, as to the time frame to file the application would result in the court not having jurisdiction to hear the application right from beginning. The Court of Appeal in the case of *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* (*supra*) had correctly ruled that:

> Thus, compliance with the time frame is fundamental. It goes to the starting point, that of jurisdiction to hear the application. This was clearly expressed by Hashim Yeop Sani FJ in *Ravindran v. Malaysian Examination P Muthukrishnan Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168; in the following passages:
>
> > In our view of whole issue is clearly one of jurisdiction. In the event only the first consideration of the judge is relevant. Since the judge rejected the explanation for the delay it follows that the court had no jurisdiction to hear the application for leave for an order of *certiorari*. Whether the application for an order of *certiorari* had merits or not was irrelevant. This principle is implicit in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower*. There had been no jurisdiction to hear the application for *certiorari* because

> Order 53 rule 1A of the Rules of the High Court 1980 expressly direct that leave shall not be granted unless the application is made within six weeks after the date of the proceeding.

[122] In that case, the Court of Appeal concluded that:

> Based on the authorities mentioned above, we are of the view that leave to apply for this judicial review should not therefore have been granted to the Appellants since the learned judge had no jurisdiction to allow it in the first place due to the Appellants' unaccountable breach of Order 53 rule 3(6) of the RHC.

[123] Applying the same principle to the facts of the present case, we are of the view that the High Court has no jurisdiction to hear the appellant's application for judicial review on the ground that the time frame of 40 days under O. 53 r. 3(6) of the RHC 1980 has not been complied with. On this ground alone, we are in agreement with the Court of Appeal that the respondent's first objection must be upheld and the judicial review application by the appellant ought to be dismissed *in limine*; and consequently, the appellant's appeal before us must also be dismissed.

[124] In view of the above findings, there is no necessity for this court to consider the second objection that the proper party was not named as the first respondent. There is also no necessity to go into the merit of the judicial review application. As has been clearly said by Hashim Yeop Sani FJ in *Ravindran P Muthukrishnan v. Malaysian Examination Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168: "Since the judge rejected the explanation for the delay it follows that the court had no-jurisdiction to hear the application for leave for an order of *certiorari* ... whether the application for an order of *certiorari* had merits or not was irrelevant".

[125] Question 5 and Question 6 relate to the appellant's complaint that preliminary objections by the respondents should not be made at the hearing of the appeal at the Court of Appeal when leave to commence judicial review had been granted and the substantive judicial review application had been disposed of by the High Court. The appellant argued that the preliminary objections should have been raised at the leave stage at the High Court and the respondents are barred and estopped from raising such preliminary objections. The appellant further contended that the first respondent had conceded to such leave being granted by the High Court; and therefore are deemed to have waived its rights to make any preliminary objection in the Court of Appeal.

[126] We cannot agree with the appellant on this point. At the leave stage, the application was made by the appellant *ex parte*. Both the first and second respondents were not present in court as they were not served yet with all the relevant documents. Obviously, the respondents cannot be expected to raise any preliminary objection at the leave stage. Therefore, the question

that the respondents were barred and estopped from raising such preliminary objections after leave has been granted does not arise. The first appearance by both the respondents in the application was when the application proper was heard *inter partes*. That is the first and the earliest opportunity for them to appear and to raise the preliminary objections. There is nothing irregular about that.

[127] The appellant contended that the first respondent had conceded to such leave being granted by the High Court and therefore, the first respondent is deemed to have waived its right to make any preliminary objection.

[128] In the present case the first respondent is Pentadbir Tanah, Kemaman; and the second respondent is a company known as Maju Timor Sdn Bhd. The first respondent is represented by the State Legal Advisor of Terengganu, while the second respondent is represented by a private lawyer. It is not disputed that neither of them was present in court at the hearing of the application for leave. Besides the appellant's counsel, an officer from the Attorney General's Chambers was present in court at the hearing for leave. His presence in court was based on the notice given by the appellant under O. 53 r. 3(2) of the RHC 1980 which requires that: "The applicant must give notice of the hearing of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits".

[129] The presence of the officer from the Attorney General's Chambers throughout the proceeding does not mean that he was representing the first respondent particularly when the application for leave was made *ex parte*. This issue was clearly explained by Abdul Kadir Sulaiman J in *Chow Hong Lit lwn. YB Menteri Sumber Manusia, Malaysia & Satu Lagi* [1998] 5 CLJ 169; [1998] 3 MLJ 63 in the following passage:

> Counsel for the applicant appeared to be confused about the position of the Attorney General as Attorney General under O 53 r. 1(3), with that of the Attorney General as the legal adviser to the Government of Malaysia under art. 145(2) of the Federal Constitution. As the Attorney General under O 53 r. 1(3), the applicant must give notice to the Attorney General on his action for leave to apply for the orders of *certiorari* and *mandamus*, and the applicant must at the same time lodge copies of the statement and affidavit in the Attorney General's Chambers as required by r. 1(2). To achieve this purpose, the applicant had thus served the statement and affidavits in question of the Attorney General. Such service was not service on him as the legal adviser or as counsel representing the first Respondent. Hence, after leave to apply for an order under O. 53 of the RHC had been granted, the applicant was thus obliged to serve on the first Respondent - as a person directly involved in this proceeding - notice of the originating motion under 2 (1) and the documents required under r. 3(1) through counsel from the Attorney General's Chamber.

Thus it was apparent that as regards this notice of originating motion, the applicant had failed to serve the copies of the statement and affidavit in support of the application for leave on the first Respondent under rule 1 as required by Order 53 rule 3(1) of the RHC.

[130] The position is thus clear that the officer from the Attorney General's Chambers who attended court at the leave stage did not represent the first respondent, nor the second respondent. Therefore both the first and second respondents cannot be barred and estopped from raising the preliminary objections at the *inter partes* hearing of the substantive application after leave had been granted. The question whether they had waived their rights to raise the preliminary objections does not arise.

[131] The first preliminary objection under O. 53 r. 3(6) of the RHC 1980 relates to the question jurisdiction of the court. If the objection is allowed, then the High Court has no jurisdiction to hear the judicial review application and leave should not have been granted in the first place. Consequently, the High Court should not have proceeded to hear the substantive application on merit. In the present case, the High Court has no jurisdiction to grant leave as prayed for by the appellant as it is the cardinal principle of law that the court cannot confer jurisdiction upon itself when none exists. Appeals to the Court of Appeal shall be by way of rehearing; and in relation to such appeals, the Court of Appeal shall have all the powers and duties of the High Court. At the appeal stage, the "Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made and make such further orders as the case requires". (see: section 69(1)(4) of the Court of Judicature Act 1964; see also: *Ruslan Baharin Industries Sdn Bhd & Ors v. Kerajaan Malaysia* [2010] 7 CLJ 713; [2009] 5 MLJ 63).

[132] Therefore, the respondents are at liberty to raise the preliminary objections when the case came up for appeal at the Court of Appeal particularly when the High Court Judge failed to consider their objections earlier. There is no legal impediment for that. The Court of Appeal was right in hearing the preliminary objections and subsequently dismissing the appeal after allowing the objections.

[133] The preliminary objections were first raised in the High Court. Thereafter, at the Court of Appeal, written submissions were filed in advance of the hearing of the appeal as well as the preliminary objections. Then, the hearing of the appeal was adjourned to another date to enable counsel for the appellant to be prepared to argue the preliminary objections. Therefore, it is not correct for the appellant to say that they were not given prior notice on the preliminary objections raised at the Court of Appeal.

A

Conclusion

[134] In the result, for all the reasons given above, we hold that the judicial review application by the appellant was filed outside the stipulated 40 days time frame provided for by O. 53 r. 3(6) of the RHC 1980 (the applicable provisions then). The 40 days period started to run from the date when the decision of the State Authority to acquire the appellant's land in question was first communicated to the appellant when Form E together with the schedule attached thereto was served on the appellant on 7 March 2006. Since the judicial review application was only filed by the appellant on 6 January 2008, it was clearly outside the stipulated 40 days period. Therefore, the High Court has no jurisdiction to grant leave and to hear the substantive judicial review applications; and the application must be dismissed *in limine*.

[135] Therefore, the first preliminary objection is allowed and upheld. It is not necessary to deal with the second preliminary objection and the merits of the substantive application. We have also dealt with all the questions posed before us for determination in this judgment.

[136] We, therefore, dismiss the appeal with costs.

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